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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

MANHATTAN-BRONX POSTAL UNION,
an unincorporated association,

and

THEODORE A. PETRE,
individually on behalf of himself and on
behalf of all others similarly situated,

Petitioners,

v.

JOHN A. GRONOUSKI,
individually and as Postmaster General
of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on July 29, 1965.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 55), is unreported. The opinion of the Court of Appeals (Appendix, *infra*, 15-25) is unreported as of the date of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on the 29th day of July, 1965 (Appendix, *infra*, 26). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal district court has jurisdiction over a cause of action seeking to compel a federal official to grant exclusive recognition to an employee organization as the exclusive representative of an employees unit under Executive Order 10988 upon allegations by the employee organization, and employees of the unit, that the official arbitrarily, capriciously and unlawfully failed to comply with the requirements of Executive Order 10988 in adopting standards for such designation.

2. Whether the right of an employee organization to recognition as the exclusive representative of an employee unit, and the right of the employees of the unit to select their exclusive representative, under Executive Order 10988, are rights appropriate for judicial vindication.

3. Whether a federal official has the authority to refuse to accord an employee organization recognition as the exclusive representative of an employee unit when a majority of the eligible voters of such unit casts valid ballots at an election held under the provisions of Executive Order 10988, and the employee organization received a majority of the votes so cast, for the sole reason that less than 60 per cent of the eligible voters of

the unit cast valid ballots, and the employee organization did not receive more than 50 per cent of the total number of eligible voters of the unit.

RELEVANT STATUTORY AND EXECUTIVE ORDER PROVISIONS

The relevant provisions of the applicable statutes and of Executive Order 10988 are set forth in the Appendix hereto, *infra*, 26-33.

STATEMENT OF THE CASE

On January 17, 1962, President Kennedy, acting under the authority granted him by the Constitution, by section 1753 of the Revised Statutes, 5 U.S.C. 631, and as President, issued Executive Order 10988, entitled "Employee-Management Cooperation in the Federal Service" (Preamble, E. O. 10988, Appendix, *infra*, 27-28.

In June, 1963, as amended in November, 1963, respondent, acting under the provisions of Section 11 of the Executive Order, published Instructions and Procedures authorizing a representation election, effective as of April 1, 1964, by the use of a membership list-card authorization designation system (R. 5-7, 17-20). Petitioner, Manhattan-Bronx Postal Union, hereinafter referred to as Manhattan-Bronx, an employee organization within the provisions of the Executive Order (R. 3-4), and Local No. 1, National Association of Post Office Mail Handlers, Watchmen, Messengers and Group Leaders, a competing labor union, hereinafter referred to as Local No. 1, sought designation in the election as the exclusive representative of the mail handlers unit in the New York post office (R. 7, 17). At the time of the publication of the Instructions and Procedures, and up to the time of the adverse action of the district court, Manhattan-Bronx was the duly designated exclusive representative of the unit by virtue of a secret ballot election held in June, 1962 (R. 7).

During the progress of the election, Manhattan-Bronx brought to respondent's attention certain claimed irregularities with respect to the eligibility of Local No. 1 to seek exclusive recognition and requested that Local No. 1 be disqualified from seeking designation as exclusive representative of the unit (R. 7-10). Respondent refused to comply with this request and petitioners instituted this suit (R. 10, iii).

Subsequent to the delivery of the membership lists and designation cards for counting, respondent, for the first time, announced that the determination of exclusive representation would be based upon a showing of 50 per cent plus 1 of the total number of eligibles of the unit (R. 12). Manhattan-Bronx was advised that since it had not been designated by 50 per cent plus 1 of all of the eligible employees of the unit, although it had received more than a majority of actual designations, and more than a majority of the employees of the unit had voted, it would not be certified as exclusive representative of the unit (R. 12). Thereupon, on February 3, 1964, petitioners filed their Amended and Supplemental Complaint asking that the designation election be declared invalid; that Local No. 1 be declared unqualified to participate in the election, or, in the alternative, that Manhattan-Bronx be granted exclusive representation of the unit (R. 1, 15).

The jurisdiction of the district court was invoked under 28 U.S.C., Sections 1331, 1332, 1391 and 2201; and Title 11, District of Columbia Code, 1961 ed., Sections 305 and 306 (R. 1).

On February 14, 1964, petitioners and respondent stipulated that determination of the matter would be held in status quo until respondent decided either to give effect of the results of the membership list-card authorization designations, or to hold another election by secret ballot (R. 20).

In April, 1964, respondent announced that the true intent of the mail handlers could not be ascertained from the membership list-card authorization designations,

and agreed to hold an election in the unit by secret ballot in May and June, 1964 (R. 31-33, 34). Neither respondent's announcement of this decision nor the election notice made reference to the number of votes required for designation as exclusive representative of the unit (R. 31, 34-36).

When the votes were counted, it was determined that 6,535 employees of the unit were eligible to vote. Of this number, 3,729 cast eligible ballots and 11 cast invalid ballots. The percentage of eligible votes cast was 57.06 per cent. Manhattan-Bronx received 2,493 votes, or 66.6 per cent of the total, Local No. 1 received 1,156 votes, or 30.9 per cent, and 80 employees voted for no union (R. 28, 37).

On June 19, 1964, Manhattan-Bronx was advised by respondent that it would not be certified as the exclusive representative of the unit since less than 60 per cent of the eligible employees of the unit had not cast valid ballots, and it had not received the votes of more than 50 per cent of the eligible employees of the unit. Manhattan-Bronx was advised further that both it and Local No. 1 would be certified as being entitled to formal recognition, effective as of July 4, 1964 (R. 38-40).

On June 26, 1964, petitioners filed a Supplemental Complaint alleging that the action of respondent was arbitrary, capricious and unlawful and in violation of Section 6(a) of Executive Order 10988, and the decisions of the courts (R. 26-28). Petitioners prayed that Manhattan-Bronx be designated the exclusive representative of the mail handlers unit in the New York post office, effective as of July 4, 1964; that pending hearing and determination of the action on the merits respondent be restrained from (a) decertifying Manhattan-Bronx as the exclusive representative of the unit, (b) certifying that said petitioner had not been designated by the employees of the unit as the exclusive representative of the unit, effective as of July 4, 1964, and (c) certifying Local No. 1 and Manhattan-Bronx as entitled to formal recognition of said unit (R. 30).

On July 1, 1964, respondent moved for summary judgment (R. 40). At the hearing on the motion, it was agreed that the motion could be considered in the alternative as a Motion to Dismiss, and that the court could grant summary judgment for petitioners, if it found for them, without the necessity of their making a formal written motion (Appendix, *infra*, 19).

On July 2, 1964, the district court entered its Order dismissing petitioners' complaint on the grounds that it lacked jurisdiction over the cause, and that if it had jurisdiction respondent would be entitled to judgment as a matter of law (R. 55).

The Court of Appeals affirmed on July 29, 1965 (Appendix, *infra*, 26) on two grounds (1) that the suit was one against the United States, which cannot be maintained without its consent, and (2) the right which petitioners seek to assert is not appropriate for judicial vindication. The Court of Appeals did not pass on the district court's alternative finding that respondent was entitled to judgment as a matter of law if the court did have jurisdiction (Appendix, *infra*, 19).

REASONS FOR GRANTING THE WRIT

1. The ruling of the district court and the Court of Appeals that the district court did not have jurisdiction is erroneous and is in apparent conflict with the applicable decisions of this Court.

2. The ruling of the Court of Appeals that the right which petitioners seek to assert in this suit is not appropriate for judicial vindication is erroneous and is in apparent conflict with the applicable decisions of this Court.

3. The ruling of the district court that respondent was entitled to judgment as a matter of law, and the failure of the Court of Appeals to review this finding and to reverse it, is erroneous and is in conflict with the applicable decisions of this Court.

4. The questions raised by this suit are of such importance as to warrant the review and decision of this Court.

ARGUMENT

1. The District Court Had Jurisdiction.

(a) This is not a suit against the United States. Petitioners' suit seeks relief in the nature of a mandatory injunction against an arbitrary, capricious and unlawful act of a federal official. Petitioners urge that respondent exceeded his express or implied powers under Executive Order 10988 in adopting the so-called 60 per cent or more than 50 per cent of total eligibles in a unit standard in the designation of an exclusive representative for the unit and, accordingly, the doctrine of sovereign immunity is not applicable, and respondent's action must be considered to be his individual act and not that of the United States. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Philadelphia v. Stimson*, 223 U.S. 605 (1912); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Peters v. Hobby*, 349 U.S. 331 (1955); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Dugan v. Rank*, 372 U.S. 609 (1963).

The fact that should petitioners' prayer for relief be granted respondent would be required to perform a mandatory act does not by itself make this a suit against the United States. The District Courts have long exercised jurisdiction in actions seeking mandatory relief to compel a governmental official to perform a legal duty. *American School of Magnetic Healing v. McAnnulty, supra; Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930); *Roberts v. United States*, 176 U.S. 221 (1900); *Leedom v. Kyne*, 358 U.S. 184 (1958).

Respondent's reliance upon the suggestions made by the President's Temporary Committee on the Implementation of the Federal Employee Management Relation Program and the Civil Service Commission did not empower him to impose standards different than those contained in Section 6(a) of the Executive Order (R. 39, 45, Appendix, *infra*, 24).

Executive Order 10988 does not confer upon respondent, the Civil Service Commission, nor the President's Temporary Committee, the authority to modify, extend, or alter the provisions of Section 6(a) relating to the number of votes necessary for exclusive recognition. Section 13(b) confers upon the Temporary Committee the consideration of matters relating to the implementation of the Order *when referred* to it by the President, and *to make recommendations* to the President with respect to problems arising out of the provisions of certain parts of the Order, and *to suggest such amendments* as may be appropriate (Appendix, *infra*, 33). There is nothing in the record to indicate that the President conferred upon the Temporary Committee, or upon respondent, the power to impose standards of election different than the standard set forth in Section 6(a). To assume that the President had granted such power is "fanciful speculation." *Peters v. Hobby, supra*, at p. 345. Section 13(a) gives the Civil Service Commission the power to establish a program to aid in carrying out the objectives of the Order. However, the Commission is not authorized to change, alter or amend the directives contained in the Order.

Section 11 imposes upon each agency the responsibility "for determining *in accordance with this order*, by election or other appropriate means, . . . whether an employee organization represents a majority of the employees in such unit . . . ." (Emphasis supplied, Appendix, *infra*, 32).

Respondent's action was unlawful in that he imposed a standard for the designation of an exclusive represen-

tative which was in conflict with the standard imposed by Section 6(a) of Executive Order 10988 without being specifically delegated the authority to so do. *American School of Magnetic Healing v. McAnnulty, supra; Stark v. Wickard,* 321 U.S. 288 (1944); *Harmon v. Brucker, supra; Peters v. Hobby, supra.*

Section 6(a) provides that "an agency shall recognize an employee organization as the exclusive representative of the employees of an appropriate unit when such organization . . . has been designated or selected by a majority of the employees in such unit." (Appendix, *infra,* 30.) The language use is mandatory and no discretion is given the agency to adopt a different standard. This, or similar, language uniformly has been held by this Court to mean that where a majority of voters vote a quorum is present and a majority of those voting is sufficient for election. *County of Cass v. Johnston,* 95 U.S. 360 (1877); *Carroll County v. Smith,* 111 U.S. 556 (1884); *Virginia Railway Co. v. Federation No. 40,* 300 U.S. 515 (1937). To hold otherwise would mean that "an indifferent minority could prevent the resolution of the contest." *Virginia Railway Co. v. Federation No. 40, supra,* at p. 560. This statement is of particular force in the present suit. The failure of 181 employees out of 6,535 eligible employees in the mail handlers unit in the New York post office to vote deprived, under respondent's standard, the employees of the unit from being represented by an exclusive representative, and where the employees did not belong to any employee organization, the right to any representation (R. 42, Appendix, *infra,* 29-31).

The language used in Section 11 imposes upon the agencies the mere administrative duty of prescribing the mechanics of an election or designation procedure for the selection of an exclusive representative, and does not empower the agencies to make the decision as to the votes necessary for such designation. That decision was made by the President. *Peters v. Hobby, supra.*

The meaning of Section 6(a) is clear and unambiguous and is not subject to administrative construction. *County of Cass v. Johnston, supra,* at p. 369; *Koshland v. Helvering,* 298 U.S. 441 (1936).

This is not a case where respondent erroneously performed a statutory duty, or made an erroneous decision of law or fact in a situation where he had a right to make the decision (Appendix, *infra,* 23), it is a case where he prescribed a standard directly in conflict with that prescribed by the President, and his action was invalid and the standard prescribed by him must fail. *Peters v. Hobby, supra; Larson v. Domestic & Foreign Commerce Corp., supra; Leedom v. Kyne, supra.*

The language of Section 6(a) follows the recommendation of the President's Task Force on Employee-Management Relations in the Federal Service (*Report of the President's Task Force on Employee-Management Relations in the Federal Service,* November 30, 1961, at p. 15. The members of the Task Force included the Chairman of the Civil Service Commission, the Secretary of Labor, and the Postmaster General. It must be assumed that the members of the Task Force, and the drafters of the Executive Order, were aware of the construction placed by this Court upon the language of Section 6(a). If they, or the President, had desired to lodge discretion in the agencies to change the standard imposed by Section 6(a), it would have been a simple matter to have so worded the section. The previous construction by this Court of the pertinent language of the section is significant of the President's intention, as well as that of his Task Force. *Virginia Railway Co. v. Federation No. 40, supra,* at p. 561.

(b) The district court had jurisdiction of this action under its general equity powers. The petitioners show an interference with a legal right, and in the absence of an exclusive alternative remedy, the district court had a general equity power to entertain this suit. *Stark v. Wickard, supra; Harmon v. Brucker, supra; Leedom v.*

Kyne, supra. To hold otherwise would mean that petitioners' rights would be sacrificed. This Court will not "lightly infer that Congress does not intend jurisdictional protection of rights it confers against agency action taken in excess of delegated powers." *Leedom v. Kyne, supra,* at 190. As shown in paragraph (c) hereafter, the same rule applies to rights conferred by Executive Orders properly issued.

The fact that the President "did not undertake to create any role for the judiciary in the implementation of this policy.", (Appendix, *infra,* 24), is of no significance since a specific grant of judicial review is not essential to confer jurisdiction upon the courts under their general equity power. *Monongahela Bridge Co. v. United States,* 216 U.S. 177 (1910); *Lehigh Valley R. Co. v. Public Utilities Comrs.,* 278 U.S. 24 (1928); *Leedom v. Kyne, supra; Peters v. Hobby, supra.* In *Peters v. Hobby, supra,* this Court reviewed an Executive Order in the same manner as it would review an enactment of Congress and administrative interpretations thereof (see Justice Reed's dissent at page 354). It cannot be presumed that the President granted, for the public interest, specific rights to employee organizations and employees of a unit with the right hand and then took them away with the left hand, without specific language to that effect, by giving the agencies the uncontrolled discretion to impose arbitrary and capricious restrictions upon the rights granted.

(c) That petitioners' rights are conferred by an Executive Order rather than by statutory enactment, or by the Constitution, does not deprive the courts of jurisdiction since an Executive Order properly made is equivalent to law. *Peters v. Hobby, supra; Joint Anti-Fascist Refugee Committee v. McGrath, supra; United States v. Gilbertson,* C.A. 7, 111 F.2d 978 (1940); *Farmer v. Philadelphia Electric Co.,* C.A. 3, 329 F.2d 3 (1964). Respondent does not deny that Executive Order 10988 was issued under proper delegation of authority by the Constitution and by act of Congress.

2. The Rights Which Petitioners Seek To Assert Are Appropriate for Judicial Review.

Standing to challenge official conduct is recognized where the complainant can show an interest, or right, recognized by law. That the right recognized by law is terminable at the will of the grantor thereof, as found by the Court of Appeals (Appendix, *infra*, 23) does not deprive a complainant of his standing to assert his right of action. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917); *Joint Anti-Fascist Refugee Committee v. McGrath, supra.*

Executive Order 10988 conferred definite and substantial legal rights upon petitioners, the right in Manhattan-Bronx to be designated as exclusive representative of the mail handlers unit in the New York post office by virtue of the election held in May and June, 1964, and the right in petitioner, Petre, and all others similarly situated, to be exclusively represented by an employee organization of their own selection, with all of the rights attached to such representation as distinguished from informal or formal recognition. These rights are valuable rights both to the employee organization because of the impact upon its membership, and to the employees of the unit because of the advantages to them of being represented on an exclusive basis.

A brief explanation of the differences between the types of recognition will illustrate the value of exclusive recognition.

Formal recognition confers only partial representation of the employees of a unit. An employee organization possessing formal recognition has the mere right to be consulted by the agency in matters affecting the members of the organization (E. O. 10988, Sec. 5(b), Appendix, *infra*, 30). All employees of the unit who do not belong to an employee organization possessing formal recognition are unrepresented, except as the employee organization to which they belong is granted in-

formal recognition. Informal recognition grants no rights, but merely means that the employee organization may be consulted in the discretion of the agency, but "not in the formulation of personnel and other policies.", the most important of all consultation rights (E. O. 10988, Sec. 4(b), Appendix, *infra*, 29). Employees not belonging to any employee organization are unrepresented completely unless an employee organization has exclusive representation.

Exclusive representation grants well-defined rights and obligations. The employee organization is entitled, as a matter of right, to negotiate written agreements with management, covering all employees of the unit, with respect to personnel policies and practices, and with respect to other matters affecting the general working conditions of the employees of the unit. In addition, it has the right to be represented at discussions between management and employees concerning "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit." (E. O. 10988, Sec. 6(b), Appendix, *infra*, 30.) Under such representation, all of the employees of the unit are represented and protected in their rights.

3. Petitioners Were Entitled to Judgment as a Matter of Law.

The material facts in this action are not subject to disagreement. Since the district court had jurisdiction and respondent unlawfully deprived petitioners of a legal right, the court should have entered summary judgment for petitioners. The district court erred in failing to so do, and the Court of Appeals erred in not reviewing this error on the part of the district court, and in failing to order summary judgment for petitioners.

4. The Questions Raised by This Suit Are of Such Importance as To Warrant the Review and Decision of This Court.

The questions presented in this cause are of obvious importance to the successful achievement of the purposes of Executive Order 10988. The decisions below will control the courts of the District of Columbia where most of the suits against federal officials originate. The rights of several hundreds of thousands of federal employees are affected by this suit. The President's Task Force found that some 762,000 persons in the federal service belong to employee organizations (*Report of the President's Task Force on Employee-Management Relations in the Federal Service*, November 20, 1961, at p. 1). Not only are the questions presented in this cause of importance to employee organizations and federal employees, they are of importance to the public interest, as is evidenced by the following statement of the President's Task Force: "The Task Force wishes most emphatically to endorse the President's view that the public interest calls for a strengthening of employee-management relations within the Federal Government." *Report of the President's Task Force on Employee-Management Relations in the Federal Service, supra*, at p. 6. Should the several agencies of government have the power to alter at will the directives of the President without judicial review, the interests of the public will surely suffer since employee-management relations will not be strengthened by the action of the agencies but, on the contrary, will be weakened.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,882

MANHATTAN-BRONX POSTAL UNION, ET AL., APPELLANTS,

v.

JOHN A. GRONOUSKI, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided July 29, 1965

Mr. Roy C. Frank for appellants.

Mr. Jerome Nelson, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Frank Q. Nebeker* and *Mrs. Ellen Lee Park,* Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, *Senior Circuit Judge,* and DANAHER and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge*: Appellants sought declaratory and injunctive relief in the District Court against

appellee, the Postmaster General of the United States. Appellant Manhattan-Bronx Postal Union is an affiliate of the National Postal Union, a labor organization representing postal employees. Appellant Petre is a postal employee and a member of Manhattan-Bronx. They complain of appellee's refusal to recognize Manhattan-Bronx as the exclusive representative of certain employees in the New York City post office. This refusal is claimed to have been founded upon an arbitrary, capricious, and unlawful act by appellee in contravention of the terms of an Executive Order. We affirm the District Court's dismissal of the suit.

I

Executive Order 10988, issued January 18, 1962, 27 Fed. Reg. 551, grew out of the report of the President's Task Force on Employee-Management Relations in the Federal Service. That report recognized the frustrations that not infrequently assail federal employees as they observe the organizational activities of workers in private industry and what they assume to be the correspondingly greater role of the latter in the shaping of employment policies. Although the complete assimilation of the one type of employment to the other was thought to be impossible, the Order was intended to provide a framework for the collective expression by federal employees of their views about the terms and conditions of their employment. This was a project of the Executive, and not of the Congress. Executive Order 10988 does not, in its recitals, refer to any statute other than the Act of March 3, 1871, 5 U.S.C. § 631, which generally authorizes the President to issue regulations for the admission of persons into the civil service of the United States and for the governance of their conduct thereafter. The President, thus, was under no obligation to issue the Order; and his action in doing so was simply in furtherance of a personal policy of try-

ing to enhance the attractiveness and efficiency of federal employment.

In the Order the President designated levels of recognition status for employee organizations—informal, formal, and exclusive.[1] To achieve recognition as the exclusive representative of a particular unit, the Order provided that an organization must have been "designated or selected by a majority of the employees of such unit." The Order elsewhere directed the head of each agency, not later than July 1, 1962, to issue appropriate rules and regulations for its implementation, including "policies and procedures with respect to recognition of employee organizations" for purposes of exclusive recognition. The Civil Service Commission was expressly adjured to "establish and maintain a program to assist in carrying out the objectives of this order," and to furnish guidance and advice to the agencies. Lastly, the Order established a Temporary Committee on the Implementation of the Federal-Employee Management Relations Program, chaired by the Secretary of Labor and with the Secretary of Defense, the Postmaster General, and the head of the Civil Service Commission as the other members. The function of this Committee was to advise the President on the working of the program and to be generally helpful in its implementation.

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[1] Under the terms of the Order, "informal" recognition is extended to any organization of employees. This entitles such organization to submit its views from time to time on any matter of concern to its members, but it need not be consulted. "Formal" recognition is to be had when no other organization in the unit has achieved exclusive rights, and when not less than 10% of the employees in the unit are members. It entitles the organization not only to volunteer its views, but also to be consulted about personnel policies and practices, and about working conditions of concern to its members. "Exclusive" recognition means that the organization may negotiate agreements covering all employees in the unit.

It was this Committee which first formally recommended the rule of which appellants now complain. In response to a request for advice upon whether exclusive recognition should require an absolute majority of employees eligible to vote, or a simple majority of those actually voting, the Committee recommended that the agencies uniformly require that, where less than an absolute majority vote for one organization was cast, there be a majority of those voting in a "representative election"; and it defined the latter as one in which a minimum of 60 per cent of the eligible voters actually voted. It contemplated that, in special cases, an agency might determine that "a percentage slightly less than 60% is representative." The Civil Service Commission, on April 24, 1962, transmitted this advice to all the agencies with its endorsement. On May 25 following, the Post Office Department issued a Postal Bulletin, to be displayed on employee bulletin boards and elsewhere, announcing and explaining the 60 per cent rule.

Appellants initiated this litigation against the Postmaster General in respect of the New York City unit on January 7, 1964. A principal complaint was that the use of an authorization card system was unfair. After the filing of a Supplemental and Amended Complaint, the parties stipulated that an election by secret ballot would be held. In this election, only 57.07 per cent of the eligible voters voted, of which Manhattan-Bronx received a majority. Accordingly, appellee denied Manhattan-Bronx exclusive recognition, refusing to waive the 60 per cent rule in this instance because only 13 of some 6500 ballot kits had been returned as undeliverable, suggesting that many employees had deliberately refrained from voting.

A further Supplemental Complaint filed by appellants attacked this denial of exclusive representational status and asked the court to declare Manhattan-Bronx to be the exclusive representative of the unit, and, in effect, to en-

join appellee from taking any action inconsistent with that status.[2] Appellee filed a motion for summary judgment, accompanied by certain documentary materials. When that motion came on to be heard in open court, it was stipulated by the parties that (1) the motion might be considered alternatively as a motion to dismiss, and (2) summary judgment could be entered for appellants if the court found in their favor. The order thereafter entered by the court alternatively dismissed the action for lack of jurisdiction over the subject matter, and awarded summary judgment to appellee.

II

While appellants' claim on the merits appears to raise only the issue of whether appellee's adherence to the 60 per cent rule transgressed the President's Order and was, thus, unlawful, arbitrary, and capricious, we need not reach the trial court's alternative resolution of that question. We affirm instead its dismissal of the complaint, on two grounds. Appellants' suit, in effect, is one against the United States, which cannot be maintained without its consent. Moreover, the right they seek to assert in this instance is not, in our view, appropriate for judicial vindication.

The Supreme Court has made clear that a plaintiff's denomination of the party defendant is not the test of whether the suit is in fact against the United States. Many cases, both before and since *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), have recognized that "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign."[3] 337 U.S. at 687. A suit is

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[2] The material portions of appellants' prayer for relief are set out at page 6, *infra*.

[3] See, e.g., *Hawaii* v. *Gordon*, 373 U.S. 57 (1963); *Dugan*

against the United States if the judgment sought would require the payment of public funds or entail the transfer of public lands, or if it would interfere with the public administration by either restraining the Government from acting or requiring it to act. See *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Land* v. *Dollar*, 330 U.S. 731 (1947); *Seiden* v. *Larson*, 88 U.S.App.D.C. 258, 188 F.2d 661, *cert. denied*, 341 U.S. 950 (1951). The decree requested by appellants would declare Manhattan-Bronx to be the exclusive representative of the postal employees in the New York City unit, and is no doubt intended to impose upon the Postmaster General the obligation of treating it as such. Appellants also seek permanently to prevent appellee, "his agents, employees and attorneys," from:

> (a) Decertifying plaintiff, Manhattan-Bronx, as the exclusive representative of the mail handlers unit at the New York post office.
>
> (b) Certifying that plaintiff, Manhattan-Bronx, was not designated by the employees of the mail handlers unit at the New York post office as the exclusive representative of said unit, effective as of July 4, 1964.
>
> (c) Certifying Local No. 1 and plaintiff, Manhattan-Bronx as entitled to formal recognition of the mail handlers unit at the New York post office.

That there may be circumstances in which specific relief against an officer is not relief against the United States is, of course, no less well-recognized. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, at 689-90; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912).[4] But

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v. *Rank*, 372 U.S. 609 (1963); *Wells* v. *Roper*, 246 U.S. 335 (1918); *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902).

[4] In the language of the Supreme Court, the exceptions to the general rule of immunity are: "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." *Dugan* v. *Rank*, *supra*, at 621-22. See also *Malone* v. *Bow-*

such circumstances are not present here. Appellants do not contend that either appellee's assumption of authority to accord recognition to the representatives of employees within the Post Office Department, or his exercise thereof in this instance, violated any provision of the Constitution. See *Dugan* v. *Rank, supra.* They do claim that his adoption of and adherence to the 60 per cent rule is "in violation of" Executive Order No. 10988. But, even if true, this would not in our view establish that appellee's actions were clearly beyond his legal authority.[5] The Postmaster General's responsibility for the administration of Government employment policies and regulations within his department is unquestioned. By the terms of the order, he, like the heads of other agencies, was, in his administration of the Post Office Department, directed to carry out the policies therein expressed. He was instructed to adopt appropriate regulations and procedures to achieve that purpose. Presumably the President foresaw that such regulations and procedures should not be uniform throughout the Government, for he left their formulation and adoption to the heads of the various agencies. It would thus appear that the President intended to allow

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doin, 369 U.S. 643 (1962); *Doehle Greeting Cards, Inc.* v. *Summerfield,* 97 U.S.App.D.C. 29, 227 F.2d 44 (1955); *Fay* v. *Miller,* 87 U.S.App.D.C. 168, 183 F.2d 986 (1950).

[5] See *Larson* v. *Domestic and Foreign Commerce Corp., supra,* 689-90:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because

his subordinates some considerable flexibility in the implementation of his objective.

Appellants maintain, however, that the area of appellee's allowable discretion did not extend to the adoption of the 60 per cent rule. They contend that Section 6(a) of the Order, set forth in the margin,[6] *requires* appellee to designate, as the exclusive representative of a unit, any organization that receives a majority of the votes cast in an election in which a majority of the members of the unit vote. Thus, they say, appellee's failure to do so in this instance violated the terms of the Order and was in excess of his authority. But, whatever the construction given it in other contexts,[7] the language of Section 6(a) on its face does not immediately suggest the reading appellants urge that it compels. The President may have intended his subordinates to follow the assertedly familiar construction of this language, but neither the circumstances of his

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of the officer's lack of delegated power. *A claim of error in the exercise of that power is therefore not sufficient.* [Emphasis added.]

[6] Executive Order No. 10988, Section 6(a), provides in pertinent part as follows:

> An agency shall recognize an employee organization as the exclusive representative of the employees, in an appropriate unit when such organization is eligible for formal recognition pursuant to section 5 of this order, and has been *designated or selected by a majority of the employees of such unit* as the representative of such employees in such unit. [Emphasis added.]

[7] Appellants point out that substantially identical language in Section 9(a) of the National Labor Relations Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a), and in the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 152, has been judicially construed as they urge Section 6(a) must be. See *NLRB* v. *Whittier Mills Co.*, 111 F.2d 474 (5th Cir. 1940); *Virginia Ry.* v. *System Federation No. 40, Ry. Employees*, 300 U.S. 515 (1937).

issuance of the Order, nor the report of the Temporary Committee, makes this conclusion inescapable. The short of appellants' case is that appellee has misconstrued the President's instructions, and the law is clear that an officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact, if he is empowered to make the decision. See *Larson* v. *Domestic and Foreign Commerce Corp., supra,* at 695, 703; *Arizona ex rel. Arizona State Bd. of Public Welfare* v. *Hobby,* 94 U.S.App.D.C. 170, 221 F.2d 498 (1954); *Seiden* v. *Larson, supra* at 263, 188 F.2d at 666.

III

Appellants' claim that jurisdiction does exist rests primarily upon the general equity powers of the District Court. 11 D.C. Code § 306 (1961 ed.). Those powers have on occasion in the past been successfully invoked to secure relief against various representatives of the federal establishment. But it has been commonly recognized that, in order to avoid the rock of sovereign immunity, on the one hand, and to maintain a reasonably acute sensitivity to the fundamental implications of the separation of powers, on the other, the occasion must be a compelling one.[8]

Executive Order 10988 represents in essence a formulation of broad policy by the President for the guidance of federal employing agencies. It had no specific foundation in Congressional action, nor was it required to effectuate any statute. It could have been withdrawn at any time for any or no reason. It represented simply one Presi-

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[8] See, *e.g., United States ex rel. Greathouse* v. *Dern,* 289 U.S. 352 (1933); *Morrison* v. *Work,* 266 U.S. 481 (1925); *Mitchell* v. *McNamara,* No. 19,132, Decided July 6, 1965; *Pauling* v. *McNamara,* 118 U.S.App.D.C. 50, 331 F.2d 796 (1963), *cert. denied,* 377 U.S. 933 (1964).

dent's effort to move in the direction of what he had been advised by his experts would be an improvement in the efficiency of federal employment. As we have indicated, he imposed no hard and fast directives on the many different kinds of federal employees; and he left large areas for the exercise of discretion at levels below the summit, although he went to some pains to provide continuing advisory services from those people and agencies within his Administration equipped with special knowledge or experience in personnel matters.

The President did not undertake to create any role for the judiciary in the implementation of this policy. The question of his power to do so aside, he was, at least in this matter of determining representational rights, emulating the example of Congress, which has shown a marked disinclination to intrude equity courts into this process.[9]

The Postmaster General decided to follow the advice of the President's Temporary Committee, and to apply the 60 per cent rule as a means of assuring the representative character of an election to determine whether one organization should have the exclusive right to represent all the employees in the unit. That action does not seem to us to conflict with the Executive Order.[10] But, even if it

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[9] See *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Local 130, Int'l Union of Elec. Workers* v. *McCulloch*, —— U.S.App.D.C. ——, 345 F.2d 90 (1965). This is not a case where judicial review is required by the Constitution, see *Estep* v. *United States*, 327 U.S. 114, 120 (1946), nor in which the absence of a judicial forum would mean "a sacrifice or obliteration of a right which *Congress had created.*" (Emphasis added.) *Switchmen's Union* v. *National Mediation Board, supra*, at 300; see *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

[10] We note in this regard that the Chairman of the Temporary Committee which recommended the 60% rule in the first instance was the same Secretary of Labor who had

did, it does not follow that appellants have a right of such nature as to warrant intervention by an equity court. If appellants disagreed with the Postmaster General's decision as to this aspect of personnel policy, and believed it to be contrary to the President's wishes, it is obvious to whom their complaint should have been directed. It was not to the judicial branch. Congress has given the District Court many important functions to perform, but they do not include policing the faithful execution of Presidential policies by Presidential appointees.

The dismissal of the action is

Affirmed.

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served as Chairman of the Task Force which gave rise to the Executive Order. Apart from the broad flexibility which characterizes that Order generally, it hardly seems likely that the Temporary Committee would have deliberately flouted its terms. The record also shows that, even before the Temporary Committee's advice on the 60% rule was circulated, the head of the national union with which Manhattan-Bronx is affiliated had, in a conversation with an Assistant Postmaster General, signified his understanding that the percentage figures used in the Order to determine status "relate to the total number of employees eligible to vote in a unit and *not* to the number of votes actually cast." (Emphasis in original.) Thus, the construction of the Order now pressed by appellants may hardly be thought to have been generally regarded as compelled by the words used.

[Caption]

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this case be, and it is hereby, affirmed.

Per Circuit Judge McGowan

Dated: July 29, 1965.

RELEVANT STATUTORY PROVISIONS

Section 1753 of the Revised Statutes, U.S.C., Title 5, Sec. 631.

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

Act of July 27, 1958, 73 Stat. 415, U.S.C., Title 28, Sec. 1331.

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Act of July 7, 1958, 72 Stat. 349, U.S.C., Title 28, Sec. 2201.

> In the case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

19 Stat. 253, D.C. Code, 1961 ed., Title 11, Sec. 306.

> Said courts shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be a resident or be found within said district . . . .

RELEVANT PROVISIONS OF EXECUTIVE ORDER 10988

The relevant provisions of Executive Order 10988, 27 Fed. Reg. 551, are as follows:

Preamble:

> Whereas participation of employees in the formulation and implementation of personnel policies affecting them contributes to effective conduct of public business; and
>
> Whereas the efficient administration of the Government and the well-being of employees require that orderly and constructive relationships be maintained between employee organizations and management officials; and
>
> Whereas subject to law and the paramount requirements of the public service, employee-management relations within the Federal service should be improved by providing employees an opportunity for greater participation in the formulation and implementation of policies and procedures affecting their employment; and

Whereas effective employee-management cooperation in the public service requires a clear statement of the respective rights and obligations of employee organizations and agency management;

Now therefore, by virtue of the authority vested in me by the Constitution of the United States, by section 1753 of the Revised Statutes (5 U.S.C. 631), and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

Sec. 1. (a) Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity. * * * The head of each executive department and agency (hereinafter referred to as "agency") shall take such action, consistent with law, as may be required in order to assure that employees in the agency are apprised of the rights described in this section, and that no interference, restraint, coercion or discrimination is practiced within such agency to encourage or discourage membership in any employee organization.

Sec. 2. When used in this order, the term "employee organization" means any lawful association, labor organization, federation, council, or brotherhood having as a primary purpose the improvement of working conditions among Federal employees, or any craft, trade or industrial union whose membership includes both Federal employees and employees of private organizations; * * *.

Sec. 3. (a) Agencies shall accord informal, formal or exclusive recognition to employee organizations which request such recognition in conformity with the requirements specified in sections 4, 5 and 6 of this order, except that no recognition shall be accorded to any employee organization which the head of the agency considers to be so subject to corrupt influences or influences opposed to basic democratic principles that recognition would be inconsistent with the objectives of this order.

(b) Recognition of an employee organization shall continue so long as such organization satisfies the criteria of this order applicable to such recognition; but nothing in this section shall require any agency to determine whether an organization should become or continue to be recognized as exclusive representative of the employees in any unit within 12 months after a prior determination of exclusive status with respect to such unit has been made pursuant of this order.

Sec. 4. (a) An agency shall accord an employee organization, which does not qualify for exclusive or formal recognition, informal recognition as representative of its member employees without regard to whether any other employee organization has been recognized as representative of some or all employees in any unit.

(b) When an employee organization has been informally recognized, it shall, to the extent consistent with the efficient and orderly conduct of the public business, be permitted to present to appropriate officials its views on matters of concern to its members. The agency need not, however, consult with an employee organization so recognized in the formulation of personnel or other policies with respect to such matters.

Sec. 5. (a) An agency shall accord an employee organization formal recognition as the representative of its members in a unit as defined by the agency when (1) no other employee organization is qualified for exclusive recognition as representative of employees in the unit, (2) it is determined by the agency that the employee organization has a substantial and stable membership of no less than 10 per centum of the employees in the unit, and (3) the employee organization has submitted to the agency a roster of its officers and representatives, a copy of its constitution and bylaws and a statement of objectives. When, in the opinion of the head of an agency, an employee organization has a sufficient number of local organizations or a sufficient total membership within such agency, such organization may be accorded formal recognition at the national level, but such recognition shall not preclude the agency from dealing at the national

level with any other employee organization on matters affecting its members.

(b) When an employee organization has been formally recognized, the agency, through appropriate officials, shall consult with such organization from time to time in the formulation and implementation of personnel policies and practices, and matters affecting working conditions that are of concern to its members. Any such organization shall be entitled from time to time to raise such matters for discussion with appropriate officials and at all times to present its views thereon in writing. * * *.

Sec. 6. (a) An agency shall recognize an employee organization as the exclusive representative of the employees, in an appropriate unit when such organization is eligible for formal recognition pursuant to section 5 of this order, and has been designated or selected by a majority of the employees of such unit as the representative of such employees in such suit. Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned, but no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized. Except where otherwise required by established practice, prior agreement, or special circumstances, no unit shall be established for purposes of exclusive recognition which includes (1) any managerial executive, (2) any employee engaged in Federal personnel work in other than a purely clerical capacity, (3) both supervisors who officially evaluate the performance of employees and the employees whom they supervise, or (4) both professional employees and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit.

(b) When an employee organization has been recognized as the exclusive representative of employees of an appropriate unit it shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and with-

out regard to employee organization membership. Such employee organization shall be given the opportunity to be represented at discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. The agency and such employee organization, through appropriate officials and representatives, shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements. This extends to the negotiation of an agreement, or any question arising thereunder, the determination of appropriate techniques, consistent with the terms and purposes of this order, to assist in such negotiation, and the execution of a written memorandum of agreement or understanding incorporating any agreement reached by the parties. In exercising authority to make rules and regulations relating to personnel policies and practices and working conditions, agencies shall have due regard for the obligation imposed by this section, but such obligation shall not be construed to extend to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work.

Sec. 10. No later than July 1, 1962, the head of each agency shall issue appropriate policies, rules and regulations for the implementation of this order, including: A clear statement of the rights of its employees under the order; policies and procedures with respect to recognition of employee organizations; procedures for determining appropriate employee units; policies and practices regarding consultation with representatives of employee organizations, other organizations and individual employees; and policies with respect to the use of agency facilities by employee organizations. Insofar as may be practicable and appropriate, agencies shall consult with representatives of employee organizations in the formulation of these policies, rules and regulations.

Sec. 11. Each agency shall be responsible for determining in accordance with this order whether a unit is appropriate for purposes of exclusive recognition and, by an election or other appropriate means, whether an employee organization represents a majority of the employees in such a unit so as to be entitled to such recognition. Upon the request of any agency, or of any employee organization which is seeking exclusive recognition and which qualifies for or has been accorded formal recognition, the Secretary of Labor, subject to such necessary rules as he may prescribe, shall nominate from the National Panel of Arbitrators maintained by the Federal Mediation and Conciliation Service one or more qualified arbitrators who will be available for employment by the agency concerned for either or both of the following purposes, as may be required: (1) to investigate the facts and issue an advisory decision as to the appropriateness of a unit for purposes of exclusive recognition and as to related issues submitted for consideration; (2) to conduct or supervise an election or otherwise determine by such means as may be appropriate, and on an advisory basis, whether an employee organization represents the majority of the employees in a unit. * * *.

Sec. 12. The Civil Service Commission shall establish and maintain a program to assist in carrying out the objectives of this order. The Commission shall develop a program for the guidance of agencies in employee-management relations in the Federal service; provide technical advice to the agencies on employee-management programs; assist in the development of programs for training agency personnel in the principles and procedures of consultation, negotiation and the settlement of disputes in the Federal service, and for the training of management officials in the discharge of their employee-management relations responsibilities in the public interest; provide for continuous study and review of the Federal employee-management relations program and, from time to time, make recommendations to the President for its improvement.

Sec. 13. (a) The Civil Service Commission and the Department of Labor shall jointly prepare (1)

proposed standards of conduct for employee organizations and (2) a proposed code of fair labor practices in employee-management relations in the Federal service appropriate to assist in securing the uniform and effective implementation of the policies, rights and responsibilities described in this order.

(b) There is hereby established the President's Temporary Committee on the Implementation of the Federal Employee-Management Relations Program. The Committee shall consist of the Secretary of Labor, who shall be chairman of the Committee, the Secretary of Defense, the Postmaster General, and the Chairman of the Civil Service Commission. In addition to such other matters relating to the implementation of this order as may be referred to it by the President, the Committee shall advise the President with respect to any problems arising out of completion of agreements pursuant to sections 6 and 7, and shall receive the proposed standards of conduct for employee organizations and proposed code of fair labor practices in the Federal service, as described in this section and report thereon to the President with such recommendations or amendments as it may deem appropriate.